STANDARDISATION IN THE INTERNAL MARKET FOR SERVICES: AN EFFECTIVE ALTERNATIVE TO HARMONISATION?

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Abstract

The New Approach gives an important role to European standardisation in the improvement of the internal market for goods. Such a New Approach does not exist for services. For services, it is more difficult to maintain the distinction between law and technical expertise on which the New Approach is based. Services standards are much more likely to clash with existing European legislation. If the EU wants standardisation to play a more important role in the internal market for services, it will have to provide a more precise and narrower role to European standardisation in the legislative framework for services.

Key words

Standardisation, harmonisation, free movement of services, free movement of goods

1. Introduction

In the 1980s, the EU decided to develop a new strategy to improve the free movement of goods in the EU internal market. The New Approach to technical harmonisation and standards was an innovative new strategy for internal-market building. It relied on a combination of European legislation and standardisation to establish common rules for products throughout the EU. In general, the New Approach has been a success story – it has managed to remove obstacles to free movement of goods. Despite this apparent success, the "template" of the New Approach has not been copied in other sectors of the internal market. Although services play a very prominent role in the EU internal market, the EU has not decided to adopt a similar regulatory approach in the field of services. Nevertheless, European standardisation of services is referred to in the Services Directive as a tool to improve the quality and compatibility of services. However, this reference does not create a New Approach to services. Although the number of European services standards adopted in the last decade has increased significantly, these standards do not play a clear role in a legislative framework which is managed by the EU. This lack of a predefined role for European

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services standards has had an impact on the ability of European standardisation to play an important role in the internal market for services.

In this paper, it will be argued that European standardisation should not seek to compete with European harmonisation as a regulatory tool, but that it should rather aim to provide a supplementary role to legislation. Its success in the EU internal market is primarily dependent on the willingness of the EU to rely on standardisation. In the field of goods, the EU was willing to embrace European standardisation as a regulatory technique because of the prominence of national standards in the goods sector. In the services sector, European services standards have never played a prominent role. The mere reference to European standardisation in the Services Directive is unlikely to increase the significance of European services standards. From the perspective of stakeholders in the services sector, European standardisation of services could be a viable alternative to legislation. However, experience has shown that the European services standards which have been adopted suffer from a number of "defects", which have made it more difficult for the standards to have an impact on the regulation of services. One of most important problems is that a significant number of European services standards do not actually contribute to the improvement of the internal market for services. The causes of these problems can be found in the European standardisation process itself. Furthermore, the EU has not found it necessary to incorporate European standardisation of services in its regulatory approach to services to the same extent as it has done with goods.

The argument in this paper will be developed in three steps. First, the role of European standardisation in EU law will be outlined. Second, a case study on European standardisation of tourist guide services will be used to provide an empirical perspective on the role of European standardisation in the internal market for services. Third, European standardisation as a regulatory technique will be compared to European harmonisation. It will be concluded that European standardisation has not proven to possess sufficient quality as a regulatory instrument for it to be incorporated in the EU's regulatory approach to services.

2. Standardisation in EU law

a. The New Approach

In a well-functioning internal market for goods, products are able to move freely between different Member States. In the first decades of the EU's existence, free movement of goods was obstructed by the high number of product standards that were being used in the Member States. In most

Member States, a variety of product standards existed. Some of these standards were public standards, while other standards were of a private nature. Many of these standards had been adopted by national standardisation organisations. National standardisation organisations brought together businesses in a particular sector to agree on the technical specifications for their products. All businesses would subsequently comply with these standards. From the perspective of free movement and competition, this kind of standardisation is inherently paradoxical. On the one hand, it increases competition between manufacturers because everyone knows that they have to comply with the same set of (minimum) standards. On the other hand, standardisation has an anti-competitive dimension – manufacturers who do not comply with the standards and who do not manage to have their method of production reflected in the standard lose out.[2] Depending on the impact of the standard (i.e. the extent to which it obtains binding force in the market), they may be excluded from the market as a result of the standardisation process. From the point of view of free movement,[3] standardisation by national standardisation bodies improves free movement within a Member State by increasing the compatibility of the product. However, standardisation can also have a market foreclosure effect. If different national standardisation organisations adopt different product standards for the same product, this means that manufacturers have to adapt their product for each national market they would like to place their product on. Therefore, differences in national product standards can create serious obstacles to the free movement of goods. In its judgment in *Cassis de Dijon*,[4] the Court of Justice of the European Union ("CJEU") held that such product standards were measures having equivalent effect under Article 34 TFEU, and that they had to be justified and proportionate. This process of negative integration, which meant that product standards were considered as obstacles to free movement, created a regulatory gap. It put pressure on the EU to move towards a unified system for product standards.

In 1985, the EU laid down the foundations of the New Approach to technical harmonisation.[5] This regulatory approach was innovative in that it relied on a combination of harmonisation and standardisation. Under the New Approach, the EU adopts broad and general directives which lay down the essential requirements which products have to comply with before they can be placed on the EU market. For each directive adopted under the New Approach, the Commission will also issue a mandate to the European standardisation organisation CEN to request it to start

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[2] See B. Lundqvist, *Standardisation under EU Competition Rules and US Antitrust Rules* (Cheltenham, Edward Elgar, 2014).
[3] See B. van Leeuwen, *European Standardisation of Services and its Impact on Private Law* (Oxford, Hart Publishing, 2017), 186-198.
[4] Case C-120/78, *Rewe-Zentral AG*, ECLI:EU:C:1979:42.
[5] For a more detailed analysis of the background to the New Approach, see H. Schepel, *The Constitution of Private Governance* (Oxford, Hart Publishing, 2005), 63-67.

working on a European standard. The standard will lay down the precise technical requirements with which a product should comply. After the European standard has been adopted, the Commission will publish the reference to the European standard in the Official Journal of the EU. After the publication of this reference, products which comply with the European standard are presumed to comply with the relevant European legislation. In other words, compliance with the European standard becomes the main way for manufacturers to show that they comply with the European legislation. Although it is possible for manufacturers to prove that they comply with the European legislation through other means, most manufacturers choose to comply with the European standard. For most categories of products, manufacturers only have to declare that they comply with the European standard. For potentially more dangerous products, manufacturers have to go through a conformity assessment procedure – a certification process – to be able to place their products on the EU market.[6]

The focus of this paper is not so much on the "how" of the New Approach, but more on the "why" of the New Approach. Three reasons can be identified for the development of the New Approach. The first is pragmatic: the EU decided to "deal" with European standardisation for practical reasons. It was a matter of fact that a lot of different product standards in the EU existed, and that these different standards created obstacles to free movement. The EU had to remove these obstacles to improve the functioning of the internal market for goods. In doing so, it had to engage with standardisation. The best way for the EU to deal with standardisation was to control it – and that is precisely what the New Approach was designed for. The New Approach is a regulatory technique in which European standardisation has a clear but narrowly defined role. The scope of discretion that the European standardisation organisations enjoy is to a significant extent determined by the EU itself. This is not a situation where the law and standardisation are competing. Rather, the law has incorporated standardisation to its own benefit. The relationship is hierarchical in that the effect of the standardisation is dependent on the legal framework that has been created by the EU. Standardisation would not have obtained such a prominent role in the internal market for goods if it had not been incorporated in the New Approach.

The second reason for the EU's reliance on standardisation is based on the specific merits of standardisation. The set-up of the New Approach seeks to make a distinction between law and technical expertise. The precise technical specifications that products have to comply with should not be defined by lawyers. The law has to make the broad policy choices, but the technical details can be worked out by the specific industry itself. In European standardisation, the various

[6] For an analysis of the role of certification in the New Approach, see B. van Leeuwen, above n 3, 51-54.

stakeholders in a particular sector can play a role in the standardisation process. The distinction between law and technical expertise is a fundamental foundation of the New Approach.[7] Technical issues should not be regulated by law but by technical standards. Third, and finally, European standardisation was incorporated in the New Approach for efficiency reasons. It was believed and hoped by the EU that the standardisation process would be more flexible and faster than the EU legislative process.[8] The ordinary legislative procedure is a time-consuming process, which often takes a number of years to complete. This process would be too slow to deal with rapid and recent developments in technology. Standardisation would be better able to deal with technological change than the legislative process. The reality has proven to be something of a disappointment. The European standardisation process is not much faster than the European legislative process. The EU has on a number of occasions expressed its frustration with the slow pace of European standardisation.[9] In reaction to delays in European standardisation projects, it has also started to control European standardisation processes more strictly. Apparently, it is difficult – if not impossible – for stakeholders who are involved in European standardisation to focus solely on technical matters. There is a political dimension to every technical question, and the result is that European standardisation can also become a political process.[10] This casts doubt on the distinction between law and technical expertise that was explained above. It has also made it more necessary for the EU – or more precisely, the Commission – to exercise control over what (kind of) expertise is actually involved in the European standardisation process.

b. The Services Directive and Regulation 1025/2012

Although services form an important part of the EU internal market, free movement of services has not been as successful as free movement of goods. Moreover, the EU has been less active in shaping and improving the internal market for services. Nevertheless, in 2006, the EU adopted the Services Directive,[11] in which European standardisation was given a minor role. Article 26(5) mentions European standardisation as a tool to improve the compatibility and quality of services. It provides that Member States, in cooperation with the Commission, shall encourage the development of European services standards. This is the only reference to European

[7] E. Vos, 'Market Building, Social Regulation and Scientific Expertise: An Introduction' in C. Joerges, K.H. Ladeur and E. Vos (eds.), *Integrating Scientific Evidence in Regulatory Decision-Making: National Traditions and European Innovations* (Baden-Baden, Nomos, 1997), 127-139.
[8] Council Resolution on a new approach to technical harmonization and standards (85/C136/01).
[9] Commission Green Paper on the Development of European Standardization: Action for Faster Technological Integration in Europe, COM (1990) 456 final.
[10] C. Frankel and E. Hojbjerg, 'The constitution of a transnational policy field: negotiating the EU internal market for products' (2007) 14 *Journal of European Public Policy* 96.
[11] Directive 123/2006/EC of the European Parliament and the Council on services in the internal market.

standardisation in the Services Directive. The EU has not chosen to provide a more prominent role to European standardisation in the regulatory framework for services. Although the Commission has issued a number of mandates to CEN to develop services standards, most of the time these standards were not intended to provide more detail to European legislation.[12] Although standardisation is referred to in Article 26(5), there is no clear legal framework in which European services standards play a role. The obligation on the Member States to encourage European standardisation of services is formulated in a rather abstract way, and almost no Member States have included Article 26(5) in their national legislation which implemented the Services Directive.[13] The result is that most of the European services standards which have been developed through CEN have been made at the initiative of stakeholders rather than the Member States or the Commission.

If it is so difficult for the EU to improve free movement of services and to create a genuine internal market for services, why has the EU not attempted to apply the New Approach to services? Two main reasons can be identified. First of all, from a pragmatic point of view, the development of services standards is significantly less common than the development of product standards.[14] Therefore, there are not a lot of national services standards that are causing obstacles to free movement. The necessity for the EU to start regulating standardisation by incorporating it in its regulatory approach to services is missing. This tells us something about the value that service providers attach to services standards. For goods, it has always been obvious that manufacturers find standardisation a useful activity to increase and facilitate trade. For services, the picture is different. There has not really been any kind of tradition of services standardisation in the EU, and the European standardisation organisations have only recently started to push for more standardisation projects in the services sector. However, they have also encountered serious opposition in some services sectors, where stakeholders are fundamentally against standardisation.[15] They argue that the quality of services should be regulated by the market, since services are too diverse to be standardised. This reluctance on the part of stakeholders has also had an effect on the Commission's approach to services standardisation in the EU internal market.

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[12] With the exception of postal services: M/240 Mandate to CEN for standardisation in the field of postal service and equipment of 15 March 1996.
[13] See U. Stelkens, W. Weiss and M. Mirschberger (eds.), *Implementation of the EU Services Directive: Transposition, Problems and Strategies* (The Hague, Asser, 2012).
[14] H. Micklitz, 'Regulatory Strategies on Services Contracts' in F. Cafaggi and H. Muir Watt (eds), *The Regulatory Function of European Private Law* (Cheltenham, Edward Elgar, 2009), 16-61.
[15] See B. van Leeuwen, above n 3, Chapters 4 and 5.

Even though the Commission is now more openly positive about European standardisation of services, it is not sufficiently convinced about its merits to develop a New Approach to services.

Second, from a substantive point of view, European standardisation of services is likely to interact and clash with existing legislation. European services standards cover the entire service provision process. As a result, they may cover issues like the qualifications or training of the service provider, the information that has to be provided to the consumer, the quality of the service itself, payment for services etc.[16] These questions are not regulated in a legal vacuum – there is often a significant amount of (European) legislation on these issues. Therefore, it is much more difficult to maintain the distinction between law and technical expertise in the field of services. The result is that standardisation is struggling to obtain an independent role from legislation. Moreover, the law is more likely to adopt a hierarchical perspective on standardisation – particularly if the provisions of European services standards are potentially in breach of existing legislation. Therefore, European standardisation cannot really compete with European legislation in the services sector as a regulatory instrument. To be able to compete, it would have to adopt more of a non-legal perspective, which is difficult for services, and the European standardisation organisations would have to work harder to make their standards fit in the existing legal framework for services.

The EU could have established a link between European legislation and European standardisation with the adoption of Regulation 1025/2012.[17] The primary aim of the Regulation was to improve the transparency and accessibility of European standardisation. It imposes an obligation on the European standardisation organisations to consult with a broad range of stakeholders, and to try and make European standardisation more inclusive.[18] In particular, the European standardisation organisations have to do more to facilitate the participation of SMEs in European standardisation. Regulation 1025/2012 also explicitly incorporates European standardisation of services in the legislative framework for standardisation in the EU.[19] It is now possible for the Commission to issue a mandate for the development of a particular services standard. It can only do this in areas where the EU has the competence to act.[20] As a result, the Commission cannot issue mandates in the healthcare sector. Although the Regulation gives a more prominent role to services standardisation, it does not create a link between the standardisation and legislation. The

[16] H. Micklitz, *Services Standards: Defining the Core Consumer Elements and their Minimum Requirements*, Study Commissioned by ANEC, Brussels, April 2007, 81-89.
[17] Regulation 1025/2012 of the European Parliament and of the Council on European standardisation.
[18] Articles 3-6 of Regulation 1025/2012.
[19] Article 1 of Regulation 1025/2012.
[20] Article 10 of Regulation 1025/2012.

Regulation does not create a New Approach in the field of services, and it does not provide a role to European services standards as a supplement to existing or new legislation on services.

3. A case study: standardisation of tourist guide services

In this section, a case study will be used to illustrate how some of the arguments made above have an impact on European standardisation of services in the internal market.[21] In the tourism sector, standardisation has traditionally not been very common. The tourism sector strongly believes in the ability of the market to regulate itself. The quality of tourism services should not be regulated through legislation or standardisation, but should rather be left to the market. Because of the fierce competition in the sector, there is a strong incentive to provide services of a high quality. Against this background, the attitude of the sector to any attempt of (European) standardisation is by definition hostile.[22]

This is well-illustrated by the background to the European standard for tourist guide training, which was adopted in 2008.[23] Tourist guides are guides who show tourists around a city or particular attractions in a city. They are normally local – they live in the city where they provide their services. As a result, they should be distinguished from tour managers, who travel with a group of tourists to a particular destination. In a number of Member States, the tourist guide profession is a regulated profession. Tourist guides have to undertake a certain amount of training, and they have to obtain a particular kind of tourist guide qualification. In most Member States, the tourist guide profession is not regulated, although there might be some private regulation in the form of certification. In the 1980s and 1990s, the Commission brought several infringement procedures against Member States that imposed licence or exam requirements on foreign tourist guides who wanted to provide services in these Member States.[24] The CJEU held that these requirements constituted restrictions on the freedom of tourist guides to provide services in these Member States. Although the restrictions could in principle be justified on the basis of the protection of cultural heritage, it was not necessary to regulate so strictly who could provide tourist guide services.[25] This was something that could be left to the market – there was sufficient incentive for service providers to provide tourist guide services of a good quality. This process of liberalisation through negative integration was a serious disappointment for some national

[21] This section is based on a case study in B. van Leeuwen, above n 3, 131-135.
[22] For an analysis of the position of HOTREC, the European association of hotels, restaurants and cafes, see B. van Leeuwen, above n 3, 135-138.
[23] EN15565: "Tourism Services – Requirements for the provision of professional tourist guide training and qualification programmes".
[24] For an analysis of these cases, see B. van Leeuwen, above n 3, 119-120.
[25] Ibid., 119.

associations of tourist guide professions. They did not only suddenly have to compete with foreign tourist guides, but they also considered that the CJEU had rejected the local nature of their profession. A second disappointment came with the adoption of the Professional Qualifications Directive in 2005.[26] The tourist guide profession had lobbied for an exception under the Directive, which would have made it possible for them to impose additional requirements on foreign tourist guides. However, this was rejected by the Commission. Therefore, under the Directive, a Dutch tourist guide who wants to provide tourist guide services in a Member State where the tourist guide profession is a regulated profession only has to declare that they have two years of professional experience in the Netherlands.[27] This is sufficient for them to be able to provide services in a Member State with regulated access to the tourist guide profession. From the perspective of the tourist guide profession, this is a disappointing outcome.

Against this background, the European association for tourist guides decided to develop a European standard for tourist guide training and services. For the European tourist guide standard, the standardisation process was not intended to supplement intending legislation. The standardisation process was intended to fill the regulatory "gap" created by the judgments of the CJEU. As such, standardisation was used to do a job which (national) legislation was not allowed to do under EU law. Therefore, it is clear that standardisation and legislation are immediately in a competitive relationship. We will see below to what extent this competitive relationship prevents European standardisation from having an impact on the regulation of tourist guide services.

After its adoption in 2008, the European standard for tourist guide training was strongly rejected by various stakeholders in the tourism sector.[28] Similarly, the Commission was not very happy with the standard. A distinction can be made between substantive and procedural objections to the European standard. From a substantive point of view, stakeholders in the tourism sector objected to the decision to adopt a standard at all. According to some of the professional associations, no standardisation was required in this sector and the regulation of the tourist guide profession should be left to the market. There is a risk that standardisation will attempt to impose one type or definition of quality on the market.[29] This is precisely why some tour operators strongly objected to the European standard, because they wanted to be able to use their tour managers as tourist guides. The Commission was particularly concerned about one of the provisions of the European

[26] Directive 2005/36/EC of the European Parliament and of the Council on the recognition of professional qualifications.
[27] Article 5(1)(b) of Directive 2005/36/EC.
[28] R. Jansen, 'Benefits from Established European Services Standards?' CEN Seminar on Standardisation in the Tourism Sector, 8 December 2010.
[29] B. van Leeuwen, above n 3, 135.

standard, which provided that tourist guides had to spend at least 240 hours of training in the city where they wanted to provide their services.[30] This was clearly an indirectly discriminatory provision which restricted the freedom to provide services of foreign tourist guides. It would be difficult to justify in light of the earlier judgments of the CJEU.

Finally, from a procedural point of view, a significant number of professional associations in the tourism sector strongly opposed European standardisation because it was difficult for SMEs to participate in the standardisation process. For non-mandated standards which are not funded by the Commission, the parties which are involved in the standardisation process have to pay the costs of the process. This makes it more difficult for smaller businesses to participate in European standardisation, and it makes it more likely that European standardisation is used by larger business as a tool to impose its standards on the rest of the sector. Although improving the accessibility of the European standardisation process was one of the main reasons for the EU to adopt Regulation 1025/2012, it remains a real problem for SMEs to participate.[31] In a sector with a lot of SMEs, this means that there will always be opposition to European standardisation.

Overall, the impact of the European standard for tourist guide services has been minimal. It appears that the tourism sector has simply decided to ignore it. The result is that quality is still primarily regulated by the market. Nevertheless, it has been an important reason for the Commission to be sceptical about European standardisation of services. In the absence of some sort of control by the EU – for example, through a legislative framework like the New Approach – the European standard for tourist guide services shows that even *European* standards can create obstacles to free movement. It has resulted in a more cautious approach by the Commission to European standardisation of services. That cautious approach still very much resonates in the Commission's policy on European standardisation of services today.

4. Standardisation vs. harmonisation in the internal market for services

In this final section, the focus will be on the relationship between standardisation and harmonisation in the internal market for services. Based on the experience with the New Approach, it is clear that standardisation is most effective in the internal market if it fulfils a role which is clearly different from – or supplementary to – legislation. Standardisation brings a particular kind of technical expertise, which is given a precise and pre-defined role in the legislation – such as providing substance to the essential requirements set out in a directive. In the field of

[30] Ibid., 134.
[31] Ibid., 138-140.

services, this distinction between law and expertise is more difficult to maintain. This is primarily because standardisation of services is often not focussed on technical standardisation, but on the quality of services. As a result, there is a real risk that standardisation will clash with existing legislation. It would be difficult for standardisation to win such a battle because it does not possess the inherent quality that European harmonisation possesses. European legislation has a binding nature and has to be implemented in the Member States. European standardisation of services is not binding and has to "earn" its regulatory impact – it is relying on the market to apply European standards. That impact is much more difficult to achieve if the European standards which are adopted are in breach of EU law – for example, because they contain provisions which potentially breach the free movement provisions.[32] In such circumstances, EU law is likely to adopt a more hierarchical perspective to standardisation and will prevent European standards from being applied in law.

From the perspective of EU law, it would be possible for the EU to control the distinction between standardisation and legislation more strictly. This could be done by providing a clearer role to European standardisation of services in legislation. Such a New Approach to services would require a clearer division of responsibility between standardisation and legislation. It would have to be clear what kind of issues were suitable for European standardisation, and what kind of issues had to be determined through legislation. In effect, this would require the EU to create a clearer distinction between law and technical expertise in the field of services. The EU could then adopt general directives on the safety of services, while the technical details could be left to European standardisation.[33] Even if a clearer distinction between law and expertise was created, the European standardisation organisations would still have to deal with a challenge to their expertise in the field of services. In a number of services sectors, professional associations have challenged the development of European standards on the basis that many important stakeholders were not involved in the standardisation process. As a result, European standardisation resulted in a European standard which did not actually reflect the views of the majority of stakeholders in a particular sector. This is a very serious problem, which would have to be dealt with by the EU if it wanted to give standardisation a more serious role in the internal market for services. Regulation 1025/2012 goes some way towards encouraging standardisation organisations to be more transparent and accessible about their work, but many of the obligations contained in it are of a

[32] F. Cafaggi and A. Janczuk, 'Private Regulation and Legal Integration: The European Example' (2010) *Business and Politics* 1.

[33] This position has consistently been adopted by ANEC, a European non-profit association which represents consumers in European standardisation processes.

rather soft nature.[34] If the EU really wants to rely more on standardisation in the services sector, it would have to do more to guarantee the inclusiveness of European standardisation. For example, this could be done by funding the participation of SMEs and NGOs in the standardisation process.

If a clearer distinction between standardisation and legislation is made, this will also reduce the risk that European services standards breach free movement law. If the remit of the standardisation process focusses on technical issues, the stakeholders do not have to deal with complicated legal issues. The legal framework within which they operate would then already have been defined by the EU. In a significant number of European standardisation of services processes, the stakeholders were struggling to "locate" their European standard in the legal framework for their services, which often led to standards that were not compatible with EU law. Legal experience is not one of the strengths of the European standardisation organisations and legal expertise is often lacking in the European standardisation process.[35] The EU could try to encourage the European standardisation organisations to involve more lawyers in European standardisation, but this would again make standardisation less expertise-focussed. A better strategy would be for the EU to define a more precise and narrower framework within which the European standardisation organisations would operate.

So far, the Commission has not been willing to take the initiative for the creation of such a regulatory framework for services. This is because it is still fundamentally uncertain about the benefits of European standardisation in the services sector. Moreover, from a procedural point of view, the European standardisation process would have to be improved before the EU will be willing to give it a more prominent role in the regulation of services. Even if the substantive focus of services standardisation should be on (technical) expertise, the procedure for the adoption of European standardisation has to be changed significantly. Not only should the process be made more accessible to a broader range of stakeholders, but it should also be more accessible to the public. At the moment, the European standardisation process is entirely confidential. It is not known to the public which parties are involved in the adoption of a European standard, and the public does not get access to the documents which have played a role in the adoption of the standard.[36] The only moment where public input is possible in European standardisation is when the draft standard is published. Most importantly, the final product of the European standardisation process – the European standard – becomes a product which can be bought from

[34] Article 5 of Regulation 1025/2012. See B. van Leeuwen, above n 3, 50.
[35] H. Micklitz, 'The Service Directive: Consumer Contract Law Making via Standardisation' in A. Colombi Ciacchi et al. (eds.), *Liability in the Third Millenium (Liber Amicorum Gert Brüggemeier)* (Baden-Baden, Nomos, 2009), 439-464
[36] See R. van Gestel and H. Micklitz, 'European Integration through Standardisation: How Judicial Review is Breaking Down the Club House of Private Standardisation Bodies' (2013) 50 *CML Rev* 145.

the national standardisation organisations. It is protected by copyright, which is held by the national standardisation organisations.[37] This policy has to change if standardisation is to obtain a more prominent role in the regulation of services. At the moment, the standardisation organisations are to a significant extent dependent on the revenue of European standards. They will have to change their business model if they really want standardisation to obtain a role which is similar to legislation.[38] Therefore, if the EU wanted to push for more standardisation in the services sector, it should require free access to European standards as a condition for funding European standardisation processes.

5. Conclusion: the way forward

To conclude, European standardisation of services will be most effective in the internal market if it makes a clearer attempt to distinguish itself from legislation. This may sound counterintuitive, but it goes to the very roots of the role of European standardisation in EU law. European standardisation was embraced by the EU because it could provide a particular kind of expertise that was necessary from a regulatory perspective, but that was difficult to incorporate in the legislative process. Therefore, the New Approach provided a clear role to European standardisation in the regulation of product standards in the internal market. Such a role does not exist for services. As a result, the scope of European standardisation of services has been much broader. This increases the possibility that European services standards clash with existing EU law. For European standardisation of services to obtain a more prominent role in the internal market, it will have to return to its expertise: the adoption of technical standards. Such standards are also necessary for services. From this perspective, it is understandable that the EU and the European standardisation organisations are currently focussing on developing European standards for IT services.[39] The standards for this kind of services will be very technical and will look much more like product standards. This will reduce the risk that they clash with existing legislation in EU law.

Whilst from a substantive point of view European standardisation of services has to work harder to distinguish itself from legislation or harmonisation, from a procedural point of view European standardisation has to become a bit more like legislation. The legitimacy of European standardisation should be improved from an internal as well as from an external perspective. From an internal perspective, the European standardisation organisations have to open up to a broader

[37] CEN-CENELEC Guide 10, Policy on Dissemination, Sales and Copyright of CEN-CENELEC publications, November 2017.
[38] R. van Gestel and H. Micklitz, above n 35. See also B. van Leeuwen, above n 3, 221.
[39] Commission Communication, 'European Standards for the 21st Century' COM (2016) 358 final, 8-9.

range of stakeholders. These stakeholders have to be given a voice in European standardisation – even if they might not always be able to pay for this. From an external perspective, the European standardisation organisations have to make European standards more freely available to the public. If they really want European standards to obtain a similar role to legislation, they can no longer maintain that European standards should be copyright-protected. The broader availability of European standards is also likely to have a positive impact on the willingness of service providers and service recipients to rely on European standards.